

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN N. WALKER,

Defendant-Appellant.

UNPUBLISHED

October 25, 2002

No. 236754

Calhoun Circuit Court

LC No. 89-000205-FH

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Defendant, acting *in propria persona*, appeals the trial court's order denying his motion for relief from judgment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On February 9, 1989, defendant pleaded guilty of uttering and publishing, MCL 750.249. The trial court sentenced defendant to five years' probation and substance abuse treatment in lieu of a jail term. Defendant violated his probation and was arrested in Florida. His term of probation was amended to provide for a jail term and further substance abuse treatment. On July 13, 1990, defendant was released from jail and admitted to the substance abuse treatment program. Defendant absconded from the program, and on July 20, 1990, the trial court issued a bench warrant charging him with probation violation.

On January 12, 1993, defendant was arrested in Oklahoma. He was extradited to Michigan and charged with breaking and entering a building, MCL 750.110, a felony carrying a maximum penalty of ten years in prison, and assault with intent to commit sexual penetration, MCL 750.520g(1), a felony carrying a maximum penalty of ten years in prison. In a comprehensive plea bargain defendant agreed to plead guilty of the charges of breaking and entering, sexual assault, and probation violation in return for dismissal of other charges, including habitual offender charges. The parties agreed that defendant would be sentenced to concurrent terms of two-and-one-half to ten years' imprisonment for each offense. The judge in the other case sentenced defendant to concurrent terms of two-and-one-half to ten years' imprisonment for the offenses of breaking and entering and sexual assault. However, despite expressing agreement with the plea bargain, the trial court here sentenced defendant to two-and-one-half to fourteen years' imprisonment based on defendant's plea of guilty to probation

violation. Defendant did not object to the imposition of a maximum term of fourteen years' imprisonment in that case.

Defendant, acting *in propria persona*, filed a motion for relief from judgment in the probation violation case. He argued that he was denied his right to a speedy adjudication of the charge of probation violation, that the comprehensive plea bargain was illusory, and that trial counsel rendered ineffective assistance. The trial court denied the motion on the ground that defendant failed to establish good cause and prejudice as required by MCR 6.508(D)(3).

A defendant seeking relief from judgment has the burden of establishing entitlement to the relief requested. A court may not grant the relief if the defendant alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion for relief from judgment, unless the defendant demonstrates both good cause for the failure to previously raise the grounds, and actual prejudice from the alleged irregularities. MCR 6.508(D)(3). In the case of a conviction entered on a plea, actual prejudice means that the defect was such that it rendered the plea involuntary to a degree that would make it manifestly unjust to allow the conviction to stand. MCR 6.508(D)(3)(b)(ii). A defendant seeking relief from judgment based on a jurisdictional defect need not establish good cause or actual prejudice, and may raise the jurisdictional issue after appeals have been exhausted. *People v Carpentier*, 446 Mich 19, 30; 521 NW2d 195 (1994).

Authorities must exercise due diligence in executing a warrant for probation violation. In determining whether authorities exercised due diligence, a court should consider the length of the delay, the reason for the delay, and any resulting prejudice to the defendant. A lack of prejudice, in and of itself, is not sufficient to prevent a waiver of the alleged violation if the court finds that the authorities did not exercise due diligence. If the authorities do not act with reasonable dispatch under all the circumstances, the probation violation is waived. *People v Ortman*, 209 Mich App 251, 254-256; 530 NW2d 161 (1995).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's performance resulted in prejudice. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by US Const, Am VI and Const 1963, art 1, § 20. To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues the trial court erred in denying his motion for relief from judgment. He asserts that the authorities deliberately delayed in executing the arrest warrant for the charge of probation violation, and that the undue delay, some thirty-one months, waived the probation violation. Furthermore, defendant contends even assuming arguendo the probation violation was not waived, he was entitled to withdraw his plea to the charge of probation violation because the plea bargain was illusory. He asserts that trial counsel rendered ineffective assistance by failing to raise a due diligence challenge to the execution of the arrest warrant, and by failing to object to the imposition of a fourteen-year maximum term for the conviction of probation violation. Finally, defendant contends he was not required to show good cause and actual prejudice

because he asserted jurisdictional defects, i.e., lack of due diligence in executing the warrant, an illusory plea bargain, and ineffective assistance of counsel, as grounds for relief from judgment. *Carpentier, supra*.

We disagree and conclude that defendant is not entitled to relief. Initially, we conclude that defendant's argument that the charge of probation violation was waived due to undue delay in executing the warrant is without merit. Defendant was charged with violating his probation by absconding from a substance abuse treatment program. During the thirty-one month delay defendant worked in the area, but also spent time in Oklahoma. Ultimately, defendant was arrested in Oklahoma. No evidence demonstrated the authorities deliberately delayed in executing the warrant, or that defendant was prejudiced in any way by the delay. The probation violation was not waived. *Ortman, supra*. Trial counsel did not render ineffective assistance by failing to challenge the delay. Counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant received the agreed upon sentences of two-and-one-half to ten years' for the convictions of breaking and entering and sexual assault, but received a sentence of two and one-half to fourteen years' for the conviction of probation violation. He did not receive the complete arrangement for which he bargained; however, the bargain called for the imposition of an invalid sentence for the conviction of probation violation. When probation is revoked and a defendant is sentenced for the underlying offense, it is as though the sentence of probation was never imposed. *People v Burks*, 220 Mich App 253, 258; 559 NW2d 357 (1996). The Legislature is empowered to fix the minimum and maximum punishment for all crimes. *People v Morgan*, 205 Mich App 432, 433; 517 NW2d 822 (1994). The trial court must impose, as the maximum term, the maximum penalty provided by law when sentencing a person for the first time to a term of imprisonment. MCL 769.8. The imposition of a maximum term less than the statutory maximum is a nullity. *In re O'Dell*, 365 Mich 429, 431; 113 NW2d 220 (1962).

The underlying offense in the probation violation case was uttering and publishing, the maximum penalty for which is fourteen years' imprisonment. MCL 750.249. The trial court was without authority to sentence defendant to anything less than a maximum term of fourteen years' imprisonment upon conviction of probation violation and revocation of probation. Trial counsel erred by advocating that defendant accept a sentence bargain that lawfully could not be imposed in one of the three cases. However, defendant has not shown that he was prejudiced by counsel's error. Had defendant not pleaded guilty of probation violation and had the trial court revoked defendant's probation after a hearing, it would have been required to impose a fourteen-year maximum term. *Id.*

Defendant neither moved in the trial court to withdraw the plea, MCR 6.311, nor sought timely appellate review of the conviction based on probation violation. He cannot establish good cause for failure to raise the issue in a previous appellate proceeding. MCR 6.508(D)(3)(a). He admits that he recognized at the time of sentencing he did not receive the sentence for which he bargained, but he did not raise the issue in any proceeding until he filed the motion for relief from judgment. Defendant's failure to raise the issue at any prior time is tantamount to building an appellate parachute. *People v Tate*, 244 Mich App 553, 558; 624 NW2d 524 (2001). Defendant has not established he is entitled to relief from judgment. MCR 6.508(D)(3)(b)(ii).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra